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# The highest Dutch courts and the preliminary ruling procedure: Critically obedient interlocutors of the Court of Justice

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## Abstract

Little is known about the motives of national courts to request a preliminary ruling from the Court of Justice of the EU (CJEU) or their satisfaction with and implementation of answers. This article aims to fill this empirical gap on the basis of an analysis of judgments complemented with interviews with judges of the highest courts in the Netherlands. This article shows that judges extensively use the procedure and follow its outcome almost without exception, despite some dissatisfaction. This discontent has surprisingly not affected the courts' willingness to refer in future. The findings also downplay the bureaucratic politics and judicial empowerment theses emphasising strategic motives to refer. Instead, legal-formalist considerations and the desire to contribute to the development of EU law explain most of the references of the Dutch Supreme Court. The decision (not) to refer of the three highest administrative courts is primarily based on practical and pragmatic considerations.

## 1 | INTRODUCTION

There has been much (quantitative) research that tries to explain why courts in some Member States request more preliminary rulings from the Court of Justice of the European Union (CJEU) than courts in other Member States. The aim of such studies is to identify aggregate-level factors, such as the level of gross domestic product (GDP), population size or the majoritarian/constitutional tradition.<sup>1</sup> Yet, still little is known about the motives of *individual* judges to refer (or not)

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<sup>1</sup>E.g. M. Broberg and N. Fenger, 'Variations in Member States' Preliminary References to the Court of Justice – Are Structural Factors (Part of) the Explanation?' (2013) 19 *European Law Journal*, 488.

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and the considerations that play a role in the decision-making in concrete cases.<sup>2</sup> The same is true about the satisfaction of judges with the requested answers from Luxembourg.<sup>3</sup> There are some older studies suggesting a high implementation rate of CJEU judgments,<sup>4</sup> while recent contributions indicate a growing opposition of some courts to comply with CJEU judgments.<sup>5</sup> Satisfaction and implementation are, however, not necessarily the same, because even dissatisfied judges may implement CJEU judgments. Merely looking at implementation rates might not give the whole picture of the functioning of the preliminary ruling procedure and could also conceal discontent with CJEU judgments.

This article delves into the mindset of national court judges and researches, firstly, their willingness to implement CJEU judgments. It will, secondly, examine the judges' satisfaction with the requested CJEU judgments and, thirdly, their motives to refer. This article focuses on the references of the four highest Dutch courts in the period 2013–2016 (see Section 2 for an overview). The Netherlands is arguably one of the most compliant EU Member States, with courts being generally 'integration friendly'.<sup>6</sup> This general wisdom is, however, not entirely true. A Dutch judge, for example, referred to the preliminary reference procedure as 'a one-way Q&A procedure that lacks timely exchange of new relevant information'.<sup>7</sup> At the same time, there is also criticism in Dutch academic literature as to the sometimes activist and far-reaching case law of the CJEU, especially in certain areas such as tax law or intellectual property.<sup>8</sup> During a conference in November 2015 attended by Dutch judges, legal assistants and other practitioners in the field of tax law, 65% of the attendees agreed with the proposition that the CJEU does not make a major contribution to solving European tax problems.<sup>9</sup> In addition, there are also indications that *Cilfit* is applied loosely by some of the highest courts in the Netherlands.<sup>10</sup> The Council of State recently decided a point of EU law itself without a reference because of the delay and consequences for other cases that a reference would entail, despite recognising that the matter did not constitute an *acte clair*.<sup>11</sup> The latter was also explicitly mentioned by the Supreme Court as a reason for not referring.<sup>12</sup>

This article will address the three research questions based on legal-empirical research combining legal doctrinal analysis and interviews. All decisions of the highest courts to refer and not to refer in the time period 2013–2016 were analysed to address the third question on the motives to refer.<sup>13</sup> To answer the first and second question on

<sup>2</sup>For earlier empirical studies, see M. Wind, 'The Nordics, the EU and the Reluctance towards Supranational Judicial Review' (2010) 48 *Journal of Common Market Studies*, 1039; U. Jaremba, 'Polish Civil Judiciary vis-à-vis the Preliminary Ruling Procedure: In Search of a Mid-Range Theory', in B. de Witte et al. (eds.), *National Courts and EU law: New Issues, Theories and Methods* (Edward Elgar, 2016) 49; T. Pavone, 'Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance' (2018) 6 *Journal of Law and Courts*, 303.

<sup>3</sup>M. Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts', in M. Adams et al. (eds.), *Judging Europe's Judges: The Legitimacy of the European Court of Justice Examined* (Hart, 2013), 197, 197.

<sup>4</sup>An implementation rate of 90% was found for the Netherlands in the period 1961–1985. Nyikos likewise found an 'extremely high' rate of 96%. J. Korte (ed.), 'Primus Inter Pares: The European Court and National Courts. The Follow-up by National Courts of Preliminary Rulings ex Art. 177 of the Treaty of Rome: A Report on the Situation in the Netherlands' (1990) EUI Law Working Paper; S.A. Nyikos, 'The Preliminary Reference Process. National Court Implementation, Changing Opportunity Structures and Litigant Desistment' (2003) 4 *European Union Politics*, 397, 410.

<sup>5</sup>See, e.g., the way in which the Danish Supreme Court was unwilling to change its ruling after *Ajos*, Case C-441/14, *Dansk Industri*, ECLI:EU:C:2016:278; See also A. Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10 *European Constitutional Law Review*, 308; T. de la Mare and C. Donnelly, 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 2011) 363, 390–391.

<sup>6</sup>Bobek, above, n. 3, 213.

<sup>7</sup>M. de Werd, 'Dynamics at Play in the EU Preliminary Ruling Procedure' (2015), 22 *Maastricht Journal of European and Comparative Law*, 149, 152.

<sup>8</sup>E.g. H. Vording, 'EU-verdragsvrijheden: minder Nederlands activisme gewenst' [EU-freedoms: the need for less Dutch activism], in J.P. Boer (ed.), *Kwaliteit van belastingrechtspraak belicht. Liber amicorum aangeboden aan prof. dr. A.O. Lubbers* (Sdu, 2013), 209; P. Oliver and C. Stothers, 'Intellectual Property under the Charter: Are the Court's Scales Properly Calibrated' (2017) 54 *Common Market Law Review*, 517–566.

<sup>9</sup>'De machine doet het monnikenwerk, wij het denkwerk', 11 December 2015, <https://ssr.nl/2015/de-machine-doet-het-monnikenwerk-wij-het-denkwerk/>

<sup>10</sup>H. Sevenster and C. Wissels, 'Laveren tussen Ferreira en Van Dijk' [Plying between Ferreira en Van Dijk], in M. Bosma et al. (eds.), *Graag nog even bespreken. Liber amicorum Henk Lubberdink* (Raad van State, 2016), 83, 83.

<sup>11</sup>ABRvS, 13 April 2016, NL:RVS:2016:890–891, para. 5.2.

<sup>12</sup>The Supreme Court held that a reference would impede considerably effective and speedy criminal justice because the settlement of criminal cases in which a similar question is at stake will be delayed for an unacceptably long period. HR 22 December 2015, ECLI:NL:HR:2015:3608, para. 6.3.

<sup>13</sup>Searched on [www.rechtspraak.nl](http://www.rechtspraak.nl) for 'prejudiciële vragen' [preliminary questions] and '267 VWEU' [267 TFEU] for the period 1 January 2013 until 31 December 2016. For an extensive description of the research design and methodology, see J. Krommendijk, 'The Preliminary Reference Dance between the CJEU and Dutch Courts in the Field of Migration' (2018) 10 *European Journal of Legal Studies*, 101.

follow-up and satisfaction, the national court's follow-up judgment was compared with the requested CJEU ruling. For this analysis use was also made of secondary literature and commentaries discussing the reasoning of the CJEU and/or follow-up by the referring court. Interviews played an important complementary role, because it is often difficult to distill particular reasons for referral or the 'true' appraisal of the CJEU answers from national court judgments.<sup>14</sup> Sixteen interviews were conducted with Dutch judges and legal secretaries of the three highest administrative courts.<sup>15</sup> Fifteen interviews were held with judges and Advocates-General (A-Gs) in the Supreme Court; seven in the civil chamber and seven in the tax chamber, while one interviewee served in both chambers.<sup>16</sup> In order to protect the anonymity of interviewees, their names and identities are not disclosed.<sup>17</sup> The reliance on interviews obviously has limitations. The reasons provided by interviewees are often *ex post* rationalisations or interviewees might be tempted to (un)consciously downplay particular reasons, because they are not in line with their self-image and professional attitude as a judge. In order to alleviate this problem, the interview data were complemented with the analysis of case law, extra-judicial writing of judges and secondary literature to triangulate the data as far as possible.<sup>18</sup>

This article aims to fill an empirical gap in the literature. In addition to this academic relevance, this research also is practically relevant as well since it aims to assess whether allegations that the referral procedure is not working optimally and there is growing opposition to CJEU judgments are true. This article will contribute to the literature in the following ways and as such has a relevance going beyond the Netherlands.<sup>19</sup> Firstly, whereas the findings of this study cannot be transferred to other European jurisdictions, they show that we cannot merely base our understanding of the interaction between the CJEU and national courts on the actual judgments. Instead, we need to get 'into the heads and minds' of the key actors. In doing so, secondly, this article shows that there are not only differences between EU Member States with respect to the use of the preliminary ruling procedure, but also *within* Member States between different courts and even within these courts between judges.<sup>20</sup> Thirdly, this article focuses on courts that have so far not received much in-depth attention, since the literature has primarily focused on constitutional courts and their interaction with the CJEU.<sup>21</sup> Fourthly, the findings complement a large part of the research to date, primarily of social science studies relying exclusively on quantitative research.<sup>22</sup> In doing so, this study demonstrates the nuance and the complexity that is often hidden in large-scale statistical research. There is a wide variety in the reasons for national courts to refer or not. The findings thus downplay dominant theoretical explanations, including the bureaucratic politics and judicial empowerment theses that mainly emphasise political strategic considerations of judges. This research shows that legal as well as practical and pragmatic reasons are equally, or possibly even more important (Section 5). Fifthly, this article shows that the high implementation rate of CJEU judgments by the referring courts conceals some dissatisfaction with those judgments (Section 3). Even in the Netherlands, where courts have traditionally been compliant interlocutors, there is quite some criticism as to the functioning of the procedure and the CJEU judgments as this introduction has also indicated (Section 4).

<sup>14</sup>Besides a legal enumeration of the reasons why there is doubt as to the interpretation of EU law, the highest Dutch courts hardly include an explicit reflection on considerations that played a role in their decisions.

<sup>15</sup>Two interviews at the ABRvS were held in September 2015, while the other 14 took place between December 2016 and August 2017. ABRvS (6), CRvB (5) and CBb (5).

<sup>16</sup>Two interviews took place in September 2016, while the other 13 were held between June and August 2018.

<sup>17</sup>A number between 0 and 100 was randomly selected for the interviews. Note that no references are made in relation to specific cases to avoid indirect identification of the interviewees.

<sup>18</sup>For more strategies, see Krommendijk, above, n. 13, 119–120.

<sup>19</sup>The author and his colleague Jesse Claassen will conduct similar studies on states with a different practice of referral in the context of the earlier mentioned research project. This includes the following EU Member States: Ireland, United Kingdom, Germany and Austria.

<sup>20</sup>See, earlier, R.D. Kelemen and T. Pavone, 'The Political Geography of European Legal Integration' (2018) 70 *World Politics*, 358.

<sup>21</sup>E.g. special issue 'The Preliminary Reference to the Court of Justice of The European Union by Constitutional Courts' (2015) 16 *German Law Journal*.

<sup>22</sup>I would like to thank one of the anonymous reviewers for raising this point.

## 2 | THE HIGHEST DUTCH COURTS AND THE OBLIGATION TO REFER UNDER ART. 267 TFEU

Before delving into the findings of this research, it is important to sketch the legal context as well as a short background of the work of the four highest Dutch courts. Article 267 TFEU obliges courts or tribunals to refer to the CJEU when a question is raised about the interpretation or validity of EU law in a case in which 'there is no judicial remedy under national law', provided that 'a decision on the question is necessary to enable it to give judgment'. There are two exceptions to this obligation for the highest courts, which are commonly referred to as the *Cilfit* exceptions. The highest courts are not obliged to refer when the CJEU has 'already dealt with the point of law in question' (*acte éclairé*) or when 'the correct application of [EU] law may be so obvious as to leave no scope for any reasonable doubt' (*acte clair*).<sup>23</sup> The CJEU did not make it easy for national courts to find an *acte clair*, because courts 'must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice'.<sup>24</sup> Before reaching that conclusion, they have to consider the characteristic features of EU law and compare, amongst others, different language versions of the provision(s) of EU law.<sup>25</sup> As will be discussed further below, there is much discussion in the literature as to the viability of the *Cilfit* test.<sup>26</sup> This is because the requirements for an *acte clair* seem more difficult to fulfil now than at the time *Cilfit* was rendered in 1982, because there are 28 (instead of 10) different legal systems and 24 (instead of 7) official working languages. In addition, nowadays EU law extends over much more legal fields. A-G Wahl formulated this problem in a lucid way: 'If one were to adhere to a rigid reading of the case-law, coming across a 'true' *acte clair* situation would, at best, seem just as likely as encountering a unicorn.'<sup>27</sup>

The CJEU seemed to relax the *Cilfit* exceptions for the highest national courts in *Van Dijk*, because it held that the fact that other (national) courts ruled differently or did refer a question does not detract from the highest court's conclusion that the matter is *clair*.<sup>28</sup> Nonetheless, the CJEU decided on the same day in *Ferreira da Silva* that the Portuguese Supreme Court could not have determined an *acte clair* because of conflicting decisions of lower Portuguese courts and the fact that that matter frequently gave rise to difficulties of interpretation in various Member States.<sup>29</sup> The CJEU suggested that the Portuguese court's failure to request a preliminary ruling could constitute a breach of article 267 TFEU, (potentially) giving rise to *Köbler* state liability, leaving that matter for the referring court to consider. It was in *Köbler* that the CJEU determined that the principle of state liability also applies in case of infringements of EU law that stem from a decision of a national court of last instance.<sup>30</sup> Recent CJEU judgments underscore that the CJEU sticks to the strict *Cilfit* test.<sup>31</sup> Especially noteworthy is the CJEU decision in *Commission/France*, where it found for the first time a breach of Art. 267 TFEU for the failure of the French Conseil d'État to refer.<sup>32</sup>

Four Dutch courts are obliged to refer based on Art. 267 TFEU. The Supreme Court (HR) as well as the three highest administrative courts: the Administrative Division of the Council of State (ABRvS), the Central Appeals Tribunal (CRvB), the Trade and Industry Appeals Tribunal (CBb). All four courts are repeat players in the preliminary ruling procedure. In the past decades, roughly two-thirds of all Dutch questions came from those courts. The Trade and

<sup>23</sup>Case 283/81, *Cilfit*, ECLI:EU:C:1982:335, paras. 14 and 16.

<sup>24</sup>*Ibid.*, para. 16.

<sup>25</sup>*Ibid.*, paras. 17–20.

<sup>26</sup>M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press, 2014), 255; T. Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 *Common Market Law Review*, 9, 42–44.

<sup>27</sup>A-G Wahl in Joined cases C-72/14 and C-197/14, X. & *Van Dijk*, ECLI:EU:C:2015:319, para. 62.

<sup>28</sup>C-72/14 and C-197/14, X. & *Van Dijk*, ECLI:EU:C:2015:564.

<sup>29</sup>C-160/14, *Ferreira da Silva*, ECLI: EU:C:2015:565, paras. 40–42.

<sup>30</sup>C-224/01, *Köbler*, ECLI:EU:C:2003:513. See also C-173/03, *Traghetti del Mediterraneo*, ECLI:EU:C:2006:391; C-379/10, *Commission/Italy*, ECLI:EU:C:2011:775.

<sup>31</sup>C-379/15, *Association France Nature Environnement*, ECLI:EU:C:2016:603, paras. 48–50.

<sup>32</sup>C-416/17, *Commission/France*, ECLI:EU:C:2018:811, para. 111.

**TABLE 1** Number of references of the Dutch highest courts (2013–2016)

	Number of references
Council of State (ABRvS)	22
Central appeals tribunal (CRvB)	13
Trade and industry appeals tribunal (CBB)	10
Tax chamber SC (HR)	36
Civil chamber SC (HR)	12
Criminal chamber SC (HR)	1

Industry Appeals Tribunal has traditionally been a natural interlocutor of the CJEU, because it deals with economic public law and more than 80% of the legislation over which it has jurisdiction has European roots.<sup>33</sup> The other two highest administrative courts have also become prominent players at the EU level in recent years because of the Europeanisation of the fields of law over which they have jurisdiction, including for instance migration (Council of State) or social security (Central Appeals Tribunal).<sup>34</sup> The tax chamber of the Supreme Court is (one of) the biggest European players in the Netherlands with 36 references in the four year period 2013–2016, but also in comparison with other European tax judges (see Table 1).<sup>35</sup> The civil chamber is also increasingly confronted with EU law, especially in the fields of intellectual property (IP), consumer law, competition law and international private law. The criminal chamber is left out of this comparison, and will be dealt with separately at a later instance.<sup>36</sup> As will be further outlined below, the highest administrative courts are second-line courts of fact while the Supreme Court is the third instance cassation court that only examines questions of law. The Supreme Court also functions differently than, for example, the UK Supreme Court, which grants permission to appeal only when a case involves ‘an arguable point of law of general public importance’.<sup>37</sup>

### 3 | THE FULL IMPLEMENTATION OF CJEU JUDGMENTS

Nearly all requested answers of the CJEU are neatly followed by the referring court in the respective case submitted to the CJEU. During the analysis of the national court's follow-up judgment in the light of the requested CJEU judgment, no case was found in which a Dutch highest court clearly departed from the CJEU. During interviews, there were no judges that doubted the necessity of strictly complying with CJEU judgments.<sup>38</sup> Supreme Court judges held that CJEU judgments simply constitute law and cannot be disputed.<sup>39</sup> The Supreme Court and the other highest courts have never ‘dared’ to mention that the CJEU has been wrong or to choose a different direction than the CJEU.<sup>40</sup> The highest courts also had no problem with changing their own case law as a result of CJEU judgments. Interviewees referred to this as a ‘fait accompli’ and held that this is simply ‘part of the game’.<sup>41</sup> Judges even had no ‘hard feelings’ when the CJEU decided

<sup>33</sup>R. Winter in R. Koelewijn, ‘Brussels recht en de Hollandse praktijk’, *NRC Handelsblad*, 29 June 2004; Interviews 31, 69, 77.

<sup>34</sup>Interview 86.

<sup>35</sup>Only German tax courts asked more questions than Dutch courts between 2003 and 2013. Vording, above, n. 8, 209.

<sup>36</sup>The criminal chamber only submitted its first reference in 2016 on the Return Directive. Case C-225/16, *Ouhrami*, ECLI:EU:C:2017:590. The Supreme Court asked a (second) follow-up question in HR 27 November 2018, ECLI:NL:HR:2018:2192. See above, n. 12, for the reason why the Supreme Court is generally reluctant to refer in the field of criminal law. In addition, the limited number of references also stem from the fact that the impact of EU law on criminal law is minimal, even though that is changing in recent years with secondary law laying down a harmonized set of procedural rights of suspects. V. Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart, 2016), 154–184.

<sup>37</sup><https://www.supremecourt.uk/about/role-of-the-supreme-court.html>. On this difference between the UK and the Netherlands, see M. Feteris, ‘Development of the Law by Supreme Courts in Europe’ (2017) 13 *Utrecht Law Review*, 155, 157.

<sup>38</sup>Interviews 15, 27, 34, 41.

<sup>39</sup>Interviews 78; 15, 30, 41.

<sup>40</sup>Interviews 27.

<sup>41</sup>Interviews 5, 15, 18, 34, 72, 77, 82, 89, 91; Sevenster and Wissels, above, n. 10, 93.

differently than the preferred answer of the referring court as in *Kieback*: 'that is just the way it is'.<sup>42</sup> One interviewee mentioned in relation to the inconsistencies in the *Schumacker* line of cases: 'This happens. We simply execute it'.<sup>43</sup> Both *Kieback* and *Schumacker* deal with the taxing of non-residents. Tax law judges were critical about the *Schumacker* line of cases and held that *Kieback* does not fit easily into these earlier cases (see Section 4.1).<sup>44</sup>

The conclusion that CJEU judgments are loyally implemented, however, obscures the fact that national court judges are not always satisfied with all judgments, as will be made clear in the next section. This has, however, not prevented courts from questioning the need to comply with the CJEU. This loyalty is exemplified by the follow-up judgment in *Diageo Brands* about the execution of a Bulgarian judgment (allegedly) in breach of EU law. Despite enormous frustration, which will be spelled out below, the Supreme Court held that it could not examine the correctness of CJEU judgments and replace them with its own judgment (see Section 4.2).<sup>45</sup> The Central Appeals Tribunal even 'defended' the CJEU in *Franzen*, in which the CJEU wrongly interpreted the Dutch law (see Section 4.3).<sup>46</sup>

## 4 | JUDGES' DISSATISFACTION WITH SOME CJEU JUDGMENTS

Even though judges were generally satisfied with the CJEU and its judgments (Section 4.1), almost all judges and, especially highest administrative court judges and judges of the civil chamber, showed some discontent with particular judgments. They lamented that the CJEU did not answer the question asked or did so in an unclear way (Section 4.2), or the CJEU interpreted the national law and the facts of the case wrongly (Section 4.3).

### 4.1 | Cautious satisfaction with the CJEU and its judgments in general

Almost all highest court judges expressed their satisfaction with most, but certainly not all, of the answers of the CJEU. They noted in general that CJEU judgments are useful and clear.<sup>47</sup> The highest administrative court judges, especially those of the Council of State and Central Appeals Tribunal, were more reluctant and noted that the quality of CJEU judgments varies.<sup>48</sup> They were also more critical of the interaction with the CJEU and referred to the absence of a genuine dialogue.<sup>49</sup> One judge held that approximately 80% of the requested CJEU rulings were answered in a satisfactory way, while another noted that three out of ten cases were less satisfactory.<sup>50</sup> Supreme Court judges, especially those from the tax chamber, were less critical of CJEU judgments. Some interviewees from the Supreme Court only admitted, after repeating the question, that there are some problematic CJEU judgments, while others insisted that there are no deficient judgments at all.<sup>51</sup> Tax judges even warned against criticism and held that it is easy to disqualify CJEU judgments as 'oracle speech' and stated that it does not suit Supreme Court judges to talk 'sharply and unpleasantly' about CJEU judgments.<sup>52</sup> Civil judges of the Supreme Court were, however, slightly more forthcoming in enumerating some deficient CJEU judgments as discussed below. The less critical attitude of Supreme Court judges is surprising in the light of the fact that Supreme Court judges noted that the CJEU is full of (economical) administrative law judges and that the CJEU has less expertise in the area of tax and civil law, as also

<sup>42</sup>Case C-9/14, *Kieback*, ECLI:EU:C:2015:406; Interviews 33, 82.

<sup>43</sup>Case C-279/93, *Schumacker*, ECLI:EU:C:1995:31; Interview 78.

<sup>44</sup>Interviews 30, 78.

<sup>45</sup>Case C-681/13, *Diageo Brands*, ECLI:EU:C:2015:471; HR 8 July 2016, ECLI:NL:HR:2016:1431(*Diageo Brands*), para. 4.2.1.

<sup>46</sup>Case C-382/13, *Franzen*, ECLI:EU:C:2015:261; CRvB 6 June 2016, ECLI:NL:CRVB:2016:2144 (*Franzen*), para. 4.13.

<sup>47</sup>Interviews 10, 12, 15, 18, 24, 27, 30, 33, 34, 41, 44, 45, 66, 72, 77, 78, 82, 87, 91.

<sup>48</sup>Interviews 18, 24, 89.

<sup>49</sup>Interviews 10, 24, 44, 66, 81, 89, 91.

<sup>50</sup>Interviews 91, 10.

<sup>51</sup>One Supreme Court judge (41) noted that the editing of judgments seems to be valued less at the CJEU than the Supreme Court.

<sup>52</sup>Interview 15.

noted by interviewees.<sup>53</sup> One explanation for the difference between the highest administrative courts and the tax chamber mentioned by a Supreme Court judge is that highest administrative court judges have more ideas about the outcome of a case and the desired interpretation than Supreme Court judges, also because they generally 'think' more in political terms. With such an attitude, it is more confronting when the CJEU chooses a different direction. This could result in more dissatisfaction.<sup>54</sup>

Most judges, but especially those of the Supreme Court, were able to put their criticism in context. They, firstly, noted that criticism is normal and is something they are familiar with themselves.<sup>55</sup> Secondly, interviewees voiced their understanding for the difficult context in which the CJEU operates, with 28 different legal orders and 23 official languages as well as many different legal fields and specialisations.<sup>56</sup> One Supreme Court judge even expressed his 'admiration' for the CJEU, because his/her experience as a judge in the Benelux Court with three neighbouring countries and two languages showed how difficult the task of an international court is.<sup>57</sup> Within the highest administrative courts, there were more differences between judges. EU law-oriented judges had more understanding for the CJEU than national law-oriented career judges.<sup>58</sup> Some interviewees, especially those of the Supreme Court, also put part of the blame on themselves and argued that the quality of CJEU judgments depends on the order for reference of the referring court and the quality of the reasoning and analysis.<sup>59</sup> As will be argued below as well, deficient CJEU judgments could result from poor information provision by the referring court.

The interviews also revealed another difference between the Supreme Court and highest administrative courts. The highest administrative court judges primarily assessed CJEU judgments in terms of their ability to solve the case at hand. They did not examine them from a more analytical perspective focused on whether the CJEU answered all questions satisfactorily and in line with its earlier jurisprudence.<sup>60</sup> Several interviewees of the Supreme Court, however, also adopted the latter perspective and primarily voiced concerns about the consistency of CJEU jurisprudence.<sup>61</sup> One interviewee, for example, held that the CJEU pays insufficient attention to the position of the judgment within the 'edifice' of its case law, something that the Supreme Court is very much concerned with also because of its responsibility for judicial law making.<sup>62</sup> Civil law judges voiced their criticism about intellectual property cases about the 'communication to the public' ('there's neither rhyme nor reason to it', according to one interviewee)<sup>63</sup> as well as 'the essential function of a trade mark'.<sup>64</sup> Tax law judges criticised the case law in relation to direct taxes for natural and legal persons (*Schumacker* and *Daily Mail*).<sup>65</sup> Interviewees, for example, held that it is difficult to square *Kieback* with the previous *Schumacker* line of cases as well as the subsequent CJEU judgment on the football agent.<sup>66</sup> Interviewees attributed the inconsistencies to the (increasing) fact-oriented approach of the CJEU that could result in a casuistic case law leading to ever more questions in future cases in which the facts are (slightly) different.

<sup>53</sup>Interviews 27, 37, 78, 87; M. Loth, 'Who Has the Last Word? On Judicial Lawmaking in European Private Law' (2017) 25 *European Review of Private Law*, 45, 65; P. Oliver and C. Stothers, 'Intellectual Property under the Charter: Are the Court's Scales Properly Calibrated' (2017) 54 *Common Market Law Review*, 517, 565.

<sup>54</sup>Interview 30.

<sup>55</sup>Interviews 10, 15, 30, 34, 44, 59, 82.

<sup>56</sup>Interviews 15, 18, 32, 34, 41, 43, 44, 87, 91.

<sup>57</sup>Interview 87.

<sup>58</sup>Interviews 10, 27, 44, 87, 89.

<sup>59</sup>Interviews 30, 32, 34, 59, 75, 78, 79, 81. The requests of the Supreme Court 'verge on being inadmissible'. A-G Jääskinen in joined cases C-10/14, C-14/14 and C-17/14, *Miljoen*, ECLI:EU:C:2015:429, para. 40.

<sup>60</sup>Interviews 10, 18, 91.

<sup>61</sup>Interviews 27, 30, 41, 45, 87.

<sup>62</sup>Interviews 33, 78, 87.

<sup>63</sup>Interviews 45, 87.

<sup>64</sup>Interviews 27, 87.

<sup>65</sup>Case C-81/87, *Daily Mail*, ECLI:EU:C:1988:456.

<sup>66</sup>Case C-9/14, *Kieback*, ECLI:EU:C:2015:406; Case C-283/15, X., ECLI:EU:C:2017:102; Interviews 30, 78.



## 4.2 | Unclear or no answer from the CJEU

Judges from all highest Dutch courts complained that some CJEU judgments do not contain a clear answer. At other times, the CJEU answers a question that was not posed or gives no answer at all.<sup>67</sup> For all courts, several such cases could be identified based on the legal analysis and interviews conducted, even though it seems that there are fewer unclear CJEU judgments for the Trade and Industry Appeals Tribunal and the tax chamber.

One type of problematic CJEU judgments is those in which the CJEU does not answer the questions.

*An interviewee of the civil chamber pointed to an older case about the registration of the melody of 'Für Elise' as a trade mark. According to this interviewee the CJEU delved into other issues than the question of the Supreme Court that was disqualified as irrelevant by the CJEU.<sup>68</sup>*

*The interviewees of the tax chamber also pointed to an older case, Arens-Sikken. In this case about inheritance duties and overendowment debts, the CJEU considered that 'there is no need to answer' the second question about certain CJEU judgments, because it considered the question 'not relevant in the present case'.<sup>69</sup>*

Interviewees of the Council of State<sup>70</sup> and Central Appeals Tribunal<sup>71</sup> also discussed several questions that were dodged by the CJEU.

*In Willems, a case dealing with the collection and storage of biometric data, the CJEU did not delve into the data protection directive 95/46 even though the Council of State had paid considerable attention to this directive in its order for reference, albeit not in the eventual questions. The CJEU – rather formalistically – mentioned that the questions were only related to Regulation 2252/2004 standards for security features and biometrics in passports and travel documents ('and only that regulation').<sup>72</sup>*

*Something similar happened with the questions in *Trijber* and *Harmsen* about the application of the Services Directive to purely internal situations, which led to follow-up questions in a subsequent case (*Visser Vastgoed*) in which the Council of State noted explicitly that its earlier questions were not answered.<sup>73</sup>*

As mentioned earlier, an unsatisfactory answer can also stem from the order for reference and the fact that certain questions or aspects of the case are not formulated explicitly and accurately enough.

*One clear example is the reference of the civil chamber in *Préservatrice Foncière*. The CJEU focused only on the liability of the State on the basis of a private-law guarantee contract, while it was also relevant that the CJEU delved into another aspect (joint and several liability).<sup>74</sup>*

<sup>67</sup>Interview 30.

<sup>68</sup>The CJEU did not answer the question on the modes of representation ('in the absence of relevance'), because *Shield Mark* did not file an application for registration in the form of a sonogram, a sound recording, a digital recording or a combination of those methods. Case C-283/01, *Shield Mark*, ECLI:EU:C:2003:641, para. 54.

<sup>69</sup>Case C-43/07, *Arens-Sikken*, ECLI:EU:C:2008:490, para. 59.

<sup>70</sup>The CJEU declared the seventh question about services of general economic interest inadmissible and limited itself to the free movement of capital. Case C-567/07, *Servatius*, ECLI:EU:C:2009:593. The ABRvS was also 'forced' to ask follow-up questions in *Somvao* about the recovery of wrongly paid subsidy grants because of the insufficient answer in *ESF*. Case C-383/06, *ESF*, ECLI:EU:C:2008:165; Case C-599/13, *Somvao*, ECLI:EU:C:2014:2462.

<sup>71</sup>In *Martens*, concerning the continued grant of funding for higher education outside that State, the CJEU did not answer the essential first question, which was also noted by the CRvB. Case C-359/13, *Martens*, ECLI:EU:C:2015:118; CRvB 31 July 2015, ECLI:NL:CRVB:2015:2357 (*Martens*), para. 4.3. The CRvB also considered follow-up questions after *Akdas* concerning the exportability of social security allowances for Turkish migrant workers. Case C-485/07, *Akdas*, ECLI:EU:C:2011:346.

<sup>72</sup>Joined cases C-446/12 to C-449/12, *Willems*, ECLI:EU:C:2015:238.

<sup>73</sup>Joined cases C-340/14 and C-341/14, *Trijber and Harmsen*, ECLI:EU:C:2015:641; ABRvS 13 January 2016, ECLI:NL:RVS:2016:75 (*Visser Vastgoed*), para. 20.1.

<sup>74</sup>Case C-266/01, *Préservatrice foncière*, ECLI:EU:C:2003:282.

Another problem occurs when the CJEU gives unfeasible directions to the referring court.

Judges at the Central Appeals Tribunal 'were at a loss' after van Delft because the CJEU basically entrusted it to 'delve into politics' and to ascertain whether an unjustified difference of treatment between residents and non-residents was made when the Health Care Insurance Act was negotiated.<sup>75</sup> In order to do so, the Tribunal invited several civil servants from the Ministry of Health who were involved in the drafting of the law in order to verify whether Art. 21 TFEU was sidelined in 'backrooms' during discussions between the Dutch government and insurance companies.<sup>76</sup>

Tax judges of the Supreme Court mentioned Sopora as difficult to implement. The CJEU determined in this case that the tax advantage for persons working in the Netherlands and residing at a distance of more than 150 kilometres from the Dutch border was not in breach of EU law, unless 'those limits were set in such a way that that exemption systematically gives rise to a net overcompensation'.<sup>77</sup> The Supreme Court in essence had to examine what the effects of the tax advantage were at a macro level based on empirical data. These data did not exist, because they were simply not registered. What is more, the question was whether the Supreme Court should even do this since it is not a court of fact. Fortunately, the analysis of A-G Niessen provided sufficient guidelines for the Supreme Court to decide the case.

Judges also considered it problematic when the CJEU does not take their concerns seriously. In doing so, the CJEU fails to appreciate that the referral decision and the formulation of the order and the questions is based on a careful deliberation.<sup>78</sup>

One case is Diageo Brands. Interviewed civil judges noted that they had 'great difficulties' with the answer of the CJEU. Judges referred to this case as 'startling' and 'very serious' and noted that this judgment led to a 'breakdown of two systems'. The Supreme Court asked whether it was forced to recognise the judgment of a Bulgarian district court that was based on a Bulgarian Supreme Court judgment 'manifestly misapplied EU law', according to the Dutch Supreme Court.<sup>79</sup> In its order, the Supreme Court hinted at non-recognition, underlining that there are good reasons for refusing the execution of such an erroneous judgment. The CJEU, nonetheless, disagreed and presented the principle of mutual recognition and mutual trust in absolute terms. It also pointed to the Commission who had determined that the Bulgarian court decisions were consistent with EU law.<sup>80</sup> Interviewees especially lamented the latter and the fact that the CJEU easily followed the 'political manipulation' of the Commission who had concluded a 'political deal' with Bulgaria after which it had withdrawn its earlier determination of a breach. In joining the Commission and A-G Szpunar, the CJEU did not address the concerns of the Supreme Court and its 'conviction' that there was a serious breach.<sup>81</sup>

Another slightly different case is T-Mobile. One interviewee held that he/she felt offended by the CJEU, because the CJEU assigned a certain point of view to the Trade and Industry Appeals Tribunal, which it did not have. The Tribunal asked an open question in relation to which it gave different options for

<sup>75</sup>Case C-345/09, *van Delft*, ECLI:EU:C:2010:610.

<sup>76</sup>CRvB 13 December 2012, ECLI:NL:CRVB:2011:BU7125 (*van Delft*), para. 4.2.10.

<sup>77</sup>Case C-512/13, *Sopora*, ECLI:EU:C:2015:108, para. 36.

<sup>78</sup>Interviews 12.

<sup>79</sup>The Supreme Court based this conclusion on a letter of the Commission in which the Commission held that lower courts cannot follow the Bulgarian Supreme Court. HR 20 December 2013, ECLI:NL:HR:2013:2062 (*Diageo Brands*), paras. 5.2.2, 5.3.2; Interviews 27, 87.

<sup>80</sup>Case C-681/13, *Diageo Brands*, ECLI:EU:C:2015:471, paras. 54–55.

<sup>81</sup>A-G Szpunar in Case C-681/13, *Diageo Brands*, ECLI:EU:C:2015:137, para. 32; Loth, above, n. 53, 65.

possible answers, but the CJEU seemed to suggest that the Tribunal wanted to 'push through the throat' a particular interpretation.<sup>82</sup>

With respect to the earlier mentioned problem of unclear answers, some judges had the impression that the CJEU increasingly comes with judgments in which the CJEU only gives general guidelines.<sup>83</sup>

*Some civil chamber judges, for example, noted that a clear yes/no question was asked in Commerz. The question was whether or not the guarantees provided by the port authority are attributable to the municipality of Rotterdam when the sole director of the port authority acted on its own and against the authority's statutes. In its order for reference, the Supreme Court discussed two options: no imputability because the municipality was not involved in the adoption of the specific guarantee or attributability because the municipality determines in general the decision-making process. The CJEU did not choose either of the two options and left this for the referring court to decide 'in the light of all the relevant evidence'. Interviewees, however, noted that the Supreme Court had already identified all circumstances in its order.*

There are also several vague CJEU judgments in highest administrative court cases in the field of migration and integration.<sup>84</sup>

*One good example is A., B., C. involving the question how courts can assess the credibility of a declared sexual orientation of an asylum seeker. According to some judges, the CJEU only mentioned what courts could not do in their assessment.<sup>85</sup> One judge even asked whether it was useful to refer in the end, because of the loss in time and the fact that the CJEU completely left it to the national court to solve the case on the basis of considerations that the Council of State had already identified and discussed before referral.*

*Another example is Martens about the Dutch three-out-of-six-years rule, which makes the continued grant of funding for higher education outside that State subject to the rule that the student applying for such funding has resided in that Member State for a period of at least three out of the six years preceding his enrolment. The CJEU only made clear that this rule is not consistent with EU law, but did not provide much clarity as to how and which factors the Central Appeals Tribunal should examine to find a genuine link with the Netherlands.*

The previous analysis seems to put all the blame on the CJEU. Some judges, however, admitted that the deferential answers of the CJEU also stem from general or unclear question from the referring courts, as was mentioned previously.<sup>86</sup>

Instead of these 'deference judgments' containing general answers that defer to the national court on the point of law, judges prefer concrete 'outcome cases' which give a very specific answer that leaves no margin for manoeuvre for the national court.<sup>87</sup> This finding contrasts with the argument put forward in the literature that national courts dislike CJEU 'interventionist' judgments usurping their own jurisdiction or limiting their room for manoeuvre.<sup>88</sup> Judges did not consider it problematic when the CJEU issues very specific 'outcome cases' which

<sup>82</sup>Case C-8/08, *T-Mobile*, ECLI:EU:C:2009:343.

<sup>83</sup>Interviews 43, 48, 66, 81, 89.

<sup>84</sup>For more discussion, see Krommendijk, above, n. 13, 144–146; case C-579/13, *P. and S.*, ECLI:EU:C:2015:369, para. 49.

<sup>85</sup>Joined cases C-148/13 to C-150/13, *A., B., C.*, ECLI:EU:C:2014:2406.

<sup>86</sup>Interview 75.

<sup>87</sup>T. Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 9 *International Journal of Constitutional Law*, 737; Interviews 41, 48, 87; Loth, above, n. 53, 65–66.

<sup>88</sup>G. Davies, 'Abstractness and Concreteness in the Preliminary Reference Procedure: Implications for the Division of Powers and Effective Market Regulation', in N.N. Shuibne (ed.), *Regulating the Internal Market* (Edward Elgar, 2006), 232.

almost solve the case at hand, as long as the CJEU bases itself on the right facts and a correct reading of national legislation.<sup>89</sup> Judges, for example, valued the CJEU's detailed analysis of national law that left little room for the Council of State in the earlier mentioned *K. and A.* case about compulsory civic integration.<sup>90</sup> Likewise, interviewed Supreme Court judges did not dislike *GS Media* in which the CJEU applied its interpretation of 'communication to the public' to the case in the main proceedings and concluded that it 'appears, subject to the checks to be made by the referring court' that the hyperlink to websites with leaked nude photographs constituted such a communication.<sup>91</sup> Tax chamber judges were also content with concrete judgments, that were criticised in the literature for being too interventionist.<sup>92</sup> They considered that such judgments are unavoidable when the interpretation could only lead to one outcome.<sup>93</sup> Some interviewees also held that the advantage of outcome cases is that they limit the discussion between the parties after the CJEU judgment and might do away with the need to organise another hearing.<sup>94</sup>

### 4.3 | Incorrect reading of facts and national law

It happens, albeit in fewer cases, that the CJEU interprets the national legal framework wrongly.

*The CJEU did not answer the third question in the social security case Franzen because it had misconstrued the Dutch law considering that the Central Appeals Tribunal is obliged to apply the hardship clause in order to remedy an unacceptable unfairness.<sup>95</sup> The CJEU failed to appreciate that this is not an obligation, but merely a possibility. In addition, it is not for the referring court to apply the clause, but the administration. Dutch judges were critical about the CJEU judgment and noted that it was 'annoying'. They lamented the lack of communication and the fact that the answer of the CJEU shows that the CJEU fails to appreciate the importance of the question at stake. Judges wondered whether there is an understanding of the Dutch social security system, also because this was the second time that the CJEU made a mistake in relation to the hardship clause.<sup>96</sup> One interviewee did not want to play a blame game but noted that the answers of CJEU caused problems and did not make it possible for the Supreme Court to decide the case. The tax chamber consequently decided to refer follow-up questions. One could debate whether only the CJEU is to be blamed, because the Central Appeals Tribunal had also provided minimal information on Dutch law. One Dutch judge recognised this as well and noted that they will pay extra attention to the formulation of the questions and the order for reference in future references.*

*The latter option of re-referral was also discussed recently in two joined cases on corporation tax and a single tax entity after a CJEU judgment based on a misunderstanding of Dutch tax law.<sup>97</sup> A-G Wattel noted that the Supreme Court could also be blamed for these 'blunders' since it did not ask the correct questions. He, nonetheless, advised against re-referral because the case could be solved based on CJEU*

<sup>89</sup>Interviews 33, 59, 69, 77, 82, 87; Only one highest administrative court judge disliked the very detailed judgment in case C-137/09, *Josemans*, ECLI: EU: C:2010:774.

<sup>90</sup>Case C-153/14, *K. and A.*, ECLI:EU:C:2015:453.

<sup>91</sup>Case C-160/15, *GS Media*, ECLI:EU:C:2016:644, para. 54; Interviews 27, 45, 87.

<sup>92</sup>Case C-59/16, *The Shirtmakers*, ECLI:EU:C:2017:362; Van Casteren in *BNB* 2017/147; Case C-520/14, *Gemeente Borsele*, ECLI:EU:C:2016:334; V-N 2016/27.20.

<sup>93</sup>Interview 15. An interviewee (34) also noted that it is difficult to judge without examining the facts.

<sup>94</sup>Interviews 69, 77.

<sup>95</sup>Case C-382/13, *Franzen*, ECLI:EU:C:2015:261, paras. 67 and 56; CrvB 1 July 2013, ECLI:NL:CRVB:2013:783 (*Franzen*), paras. 4.18 and 10.8.

<sup>96</sup>See earlier C-287/05, *Hendrix*, ECLI:EU:C:2007:494.

<sup>97</sup>Joined cases C-398/16 and C-399/16, *X.*, ECLI:EU:C:2018:110, paras. 14–17.

case law.<sup>98</sup> Because the resolution of the cases was pending at the time of the interviews, judges were reluctant to speak about the joined cases, only noting that the issue at stake is wildly complicated.

In Van der Ham, the CJEU based itself on a different time period as a result of which the CJEU gave an interpretation of another Regulation than the Regulation about which the Council of State had asked questions. This mistake was not problematic, because the specific provision in the regulation was the same.<sup>99</sup>

A related problem arises when the CJEU bases itself on the wrong facts. This is particularly difficult for a cassation court like the Supreme Court for whom the facts are established. Several interviewees noted that the CJEU should keep away from such factual determinations, also because it complicates subsequent decision making.<sup>100</sup>

One older case of the civil chamber is *Ten Kate Holding Musselkanaal* in which the CJEU relied on the intervention of the Commission and the Dutch government.<sup>101</sup> The Supreme Court mentioned this problem in its follow-up judgment and stipulated that Dutch procedural law does not allow it to take into consideration the facts as determined by the CJEU.<sup>102</sup> One interviewee held that he/she was flabbergasted and noted that this judgment came as a complete surprise.

In *Ladbroke's on games of chance via the internet*, the Supreme Court had explicitly stated in its order for reference that it was established in cassation that the betting activities are limited in a consistent and systematic manner.<sup>103</sup> The CJEU, however, examined whether this indeed was the case and eventually concluded that it is not, contrary to the Supreme Court.<sup>104</sup> This finding resulted, according to one interviewee, in 'an enormous struggle' for the Supreme Court. It eventually ruled that this judgment is very much interwoven with factual assessments that are only subject to cassation to a limited extent.<sup>105</sup>

The tax chamber was confronted with a similar problem in one customs case about the tariff classification of stand-alone music devices (Sonos). The CJEU itself had consulted the website in order to verify how the product was presented to consumers.<sup>106</sup> Several interviewees noted that the CJEU should not have done this, because facts are already established for a court of cassation and not subject to review. This determination did not prove problematic for the Supreme Court to deliver its final judgment.

## 5 | JUDGES' MOTIVES (NOT) TO REFER

One could imagine that when judges are not always satisfied with the requested CJEU judgments, this could discourage them from referring future cases. Surprisingly, the dissatisfaction does not seem to affect the courts' willingness to refer. The Dutch highest court remain loyal allies of the CJEU. Judges hardly consider their previous experiences when making the calculation of referral. Allegations of a decreasing willingness were refuted.<sup>107</sup> Civil judges, for example, mentioned that there might initially be a temptation not to refer, especially in the field of intellectual

<sup>98</sup>ECLI:NL:PHR:2018:624, para. 1.9; ECLI:NL:PHR:2018:687.

<sup>99</sup>Case C-396/12, *Van der Ham*, ECLI:EU:C:2014:98.

<sup>100</sup>Interviews 15, 27, 30, 41, 48, 59, 82, 87.

<sup>101</sup>Case C-511/03, *Ten Kate Holding Musselkanaal*, ECLI:EU:C:2005:625.

<sup>102</sup>HR 22 December 2006, ECLI:NL:HR:2006:AZ3083 (*Ten Kate Holding Musselkanaal*), para. 2.2.2.

<sup>103</sup>HR 13 June 2008, ECLI:NL:HR:2008:BC8970 (*Ladbroke's*), para. 4.16.

<sup>104</sup>Case C-258/08, *Ladbroke's*, ECLI:EU:C:2010:308, paras. 21–38.

<sup>105</sup>HR 24 February 2012, ECLI:NL:HR:2012:BT6689 (*Ladbroke's*), para. 2.9.4.

<sup>106</sup>Case C-84/15, *Sonos*, ECLI:EU:C:2016:184; see also the subtle reference to the CJEU's intervention in HR 8 July 2016, ECLI:NL:HR:2016:1347 (*Sonos*), para. 2.3.

<sup>107</sup>Interviews 27, 30, 48, 87.

property, but they argued that the Supreme Court tries to 'ignore this annoyance'.<sup>108</sup> This attitude also explains why the highest courts have been reluctant to ask follow-up questions because of a CJEU judgment.<sup>109</sup> This has only happened in a limited number of instances, discussed above.<sup>110</sup>

This raises the question as to how it can be explained that the Dutch highest courts continue to refer cases to CJEU. Obviously, in the majority of cases a CJEU answer is considered necessary simply because there is uncertainty regarding the meaning of a particular provision, for example, because it is used in contradictory ways in EU rules or has not been interpreted by the CJEU before. This article, nonetheless, shows that this logic does not fully capture the referral practice while also concealing interesting differences between the Dutch highest courts and additional considerations that play a role. It will be shown that the decision to refer of the Supreme Court is informed by legalist considerations (Section 5.1), while highest administrative courts are more pragmatic and practical (Section 5.2). Especially the highest administrative courts also refer sometimes to obtain the CJEU's authority (Section 5.3).

## 5.1 | Legalist considerations: The supreme court as a loyal contributor to the development of EU law

Most Supreme Court judges mentioned legal-formalist considerations, relating to their obligation to refer under Article 267 TFEU as the primary reason behind their decision (not) to refer.<sup>111</sup> This shows that the Supreme Court feels responsible for the correct application of EU law.<sup>112</sup> Interviewed A-Gs and external observers confirmed this loyal and 'integer' approach of the Supreme Court.<sup>113</sup> As will be outlined in the next section, only a few highest administrative court judges mentioned the formalist reason that a case is referred with the idea of complying with the obligation to refer and rather pointed to a 'natural reluctance' to refer.

Closely related to the loyalty of the Supreme Court is the wish to contribute to the development of EU law. Several Supreme Court judges mentioned this as a general consideration behind the decision to refer. Supreme Court judges emphasised that it has the task of contributing to the development of EU law.<sup>114</sup> One Supreme Court judge, for example, noted that 'You are not here for yourself, but also for the rest of Europe'.<sup>115</sup> He/she mentioned that the idea is widely shared in the Supreme Court that it is important that EU law reaches its full potential. According to him/her, the delay of 1.5 years when referring should be taken for granted and is 'the price that is paid' for being part of the EU system.<sup>116</sup> Another interviewee referred to the 'sense of responsibility' and the role of the Supreme Court as a 'wheel in the gear chain' of the European legal order, while another stressed the importance of the uniformity of EU law and the need to avoid divergences ('one of the most severe sins').<sup>117</sup> A few highest administrative court judges also made similar remarks about the need to contribute to the development of EU law, but noted at the same time that the primary purpose of the procedure is to solve a dispute.<sup>118</sup> As will be outlined in Section 5.2, most judges

<sup>108</sup>Interview 27.

<sup>109</sup>Interviews 27, 30, 33, 45.

<sup>110</sup>Visser Vastgoed, above, n. 73 and Somvaal, above, n. 70.

<sup>111</sup>Interviews 41, 48, 59, 75, 87.

<sup>112</sup>J.H.H. Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1994) 26 *Comparative Political Studies*, 510, 520; K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, 2001), 230.

<sup>113</sup>Interviews 45, 48; E.g. H.P.A.M. van Arendonk, 'De Hoge Raad als EU-rechter' [The Supreme Court as EU-judge] (2015) *Maandblad Belasting Beschouwingen*, 185, 189.

<sup>114</sup>Interviews 27, 41, 48, 59, 87; Feteris, above, n. 37, 158.

<sup>115</sup>Interviews 27, 41.

<sup>116</sup>Interview 27.

<sup>117</sup>Interviews 59, 41.

<sup>118</sup>Interviews 10, 12, 39.

**TABLE 2** Overview of the way in which references (in 2013–2016) were handled by the CJEU

	CJEU judgments with A-G opinion	
	n	%
Council of State	16	94%
Central appeals tribunal	11	91%
Trade and industry appeals tribunal	9	89%
SC tax chamber	36	64%
SC civil chamber	11	82%

<sup>a</sup>Only actual CJEU judgments and not the withdrawn cases are counted.

of the highest administrative courts prefer to prevent a reference and to solve cases themselves, because of the subsequent delay of a referral that could have negative consequences for the parties or other similar cases that might have to be put on hold.<sup>119</sup>

*Interviewees of the Supreme Court stated that an additional consideration in the decision to refer Diageo Brands about the execution of Bulgarian judgment (allegedly) in breach of EU law was to raise awareness in Luxembourg for problems with the independence of the judiciary in some EU Member States. The idea was that the reference could contribute to the rule of law in the EU.*

A clear expression of the ‘natural loyalty’ and the legal formalism of the Supreme Court is the strict application of the *Cilfit* exceptions by this court.<sup>120</sup> Supreme Court interviewees did not agree with the proposition that *Cilfit* could be applied in a lenient manner, as proposed by some highest administrative court judges.<sup>121</sup> One Supreme Court interviewee mentioned: ‘You should not think too quickly that we can decide ourselves with five sensible persons’.<sup>122</sup> Another judge proposed a strict application and mentioned, in line with *Cilfit*, that the Supreme Court should be ‘convinced’ that there is no doubt about the interpretation of EU law. He/she rejected the logic of some highest administrative court judges that no reference is needed when the question is 80% *clair* and argued that the *Cilfit* criterion is not whether a court is able to come up with a solution itself.<sup>123</sup> The Supreme Court hence prefers to play it safe.<sup>124</sup> The tax chamber is even more faithful to *Cilfit* than the civil chamber and is even criticised for referring too easily. One lower court tax judge, for example, mentioned that the CJEU has sent the tax chamber an implicit message ‘Are you there already again?’ with its judgments handed by a three judge formation without A-G Opinion.<sup>125</sup> Article 20 of the Statute of the CJEU stipulates that the latter happens when ‘the case raises no new point of law’. The (too) cautious *Cilfit* approach of the tax chamber is corroborated by data in the way in which the CJEU handled references from the highest Dutch courts (Table 2). Considerably more requests of the tax chamber (36%) were handled by the CJEU without consulting an A-G, compared with the highest administrative courts (6–11%) and the civil chamber (18%).

<sup>119</sup>Interviews 5, 10, 24, 44, 66, 77, 89.

<sup>120</sup>The more loyal approach of the Supreme Court does, however, not mean that there are no cases at all which were not referred to the CJEU, but should have been. One example relates to litigation cost order in IP cases. C.J.S. Vrendenburg, *Proceskostenveroordeling en toegang tot de rechter in IE-zaken* [Litigation costs orders and access to the courts in IP cases] (Kluwer, 2018), 222.

<sup>121</sup>Interviews 15, 34, 41, 48, 78.

<sup>122</sup>Interview 27.

<sup>123</sup>Interview 82.

<sup>124</sup>van Arendonk, above, n. 113, 189.

<sup>125</sup>This has, for example, been noted by the lower tax court judges in relation to Case C-84/15, *Sonos*, ECLI:EU:C:2016:184 and Case C-97/15, *Sprengen*, ECLI:EU:C:2016:556. Interviews 35, 65.



A possible explanation as to why the tax chamber adheres to *Cilfit* so strictly is to prevent lower courts from being tempted to refer. Roughly two-thirds of all Dutch references come from the highest courts, whereas this has traditionally been the opposite for the majority of Member States where lower courts have been more active.<sup>126</sup> The explanation of preventing lower courts' referrals coincides with recent studies showing that the highest courts have 'reconquered' control from the lowest courts over the application of EU law and references to the CJEU.<sup>127</sup> The cautiousness of the tax chamber can be attributed specifically to the famous *Van der Steen* incident. The Supreme Court failed to refer the question as to whether a natural person carrying out all work in the name and on behalf of a company is himself a taxable person within the meaning of the Sixth Directive. The Amsterdam Court of Appeal subsequently referred this question to the CJEU.<sup>128</sup> In addition, the tax chamber is watched more closely by legal practice and academia than the highest administrative courts. It is not uncommon to find five commentaries in relation to all the steps in the reference procedure: the opinion of the A-G in the Supreme Court, the Supreme Court judgment in which a referral is made (or not), the opinion of the A-G in the CJEU, the CJEU judgment, an additional opinion of the A-G at the Supreme Court and the eventual judgment of the Supreme Court. By contrast, only a handful of judgments of the Dutch highest administrative courts are commented upon, while some judgments of the Council of State are not even published. The tax chamber is thus under more external pressure than the highest administrative courts.

In conclusion, the Supreme Court primarily adopts a legalist framework and primarily refers for legal-substantive reasons. The Supreme Court considers it important to contribute to the development of EU law and it adopts *Cilfit* strictly. This loyal attitude explains why the Supreme Court continues to refer, despite the earlier mentioned discontent with some CJEU judgments.

## 5.2 | Pragmatic and practical considerations: The highest administrative courts' natural reluctance to refer

By contrast, there is a natural reluctance to refer among highest administrative court judges.<sup>129</sup> This reluctance does not relate to the quality of CJEU judgments, but can be attributed to an idea that strict compliance with Article 267 TFEU would result in weekly references, especially in Europeanised fields such as migration.<sup>130</sup> The highest administrative court judges' first instinct is to solve a dispute and decide themselves. They held that it is not necessary to immediately refer when there is some doubt about the interpretation of EU law.<sup>131</sup> Several highest administrative court judges, for example, held that when the question is 75–80% *clair*, there is no need to refer.<sup>132</sup> Some judges thus proposed a 'lighter test' than *Cilfit*.<sup>133</sup> Interestingly, the Council of State has used the aforementioned CJEU judgment in *Van Dijk*, in which the CJEU seemed to loosen the *Cilfit* requirements, as an additional justification for non-referral in several migration cases.<sup>134</sup> Some highest administrative court judges even acknowledged that they (implicitly)

<sup>126</sup>Lower courts made two tax law references in 2013–2016 and seven references in the field of customs. Six of these seven questions dealt with the validity of EU law which gives rise to an obligation to refer, even for lower courts. See Case 314/85, *Foto-Frost*, ECLI:EU:C:1987:452. For a discussion of the reasons for lower courts (not) to refer on the basis of interviews with 22 judges and legal assistants, see J. Krommendijk, 'De lagere rechter aan banden. Is er nog ruimte voor de lagere rechter om te verwijzen naar het HvJ?' [The lower court judge restricted. Is there still room for the lower court judge to refer to the CJEU?] (2018) *SEW: Tijdschrift voor Europees en economisch recht*, 183; see also Krommendijk, above, n. 13, 127–129.

<sup>127</sup>A. Dyevre, A. Atanasova and M. Glavina, 'Who Asks Most? Institutional Incentives and Referral Activity in European Union Legal Order' (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3051659](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051659); D.R. Kelemen and T. Pavone, 'The European Court of Justice's Evolving Relationship with National Judiciaries' (2017), unpublished.

<sup>128</sup>Case C-355/06, *Van der Steen*, ECLI:EU:C:2007:615.

<sup>129</sup>Interview 59; Sevenster and Wissels, above, n. 10, 90.

<sup>130</sup>Interviews 31, 32, 66, 69, 89; Sevenster and Wissels, above, n. 10, 90.

<sup>131</sup>Interviews 5, 10, 18, 44, 66, 72, 77, 81, 89.

<sup>132</sup>Interview 44.

<sup>133</sup>Council of State judges referred to the test whether the matter is 'sufficiently, albeit not entirely but to a considerable extent, *clair* or *éclairé*'. Interview 72. Sevenster and Wissels, above, n. 10, 91. See also Koelewijn, above, n. 33; E.g. CBb 22 May 2017, ECLI:NL:CBb:2017:179, para. 4.7.

<sup>134</sup>Sevenster and Wissels, above, n. 10, 87–89. E.g. ABRvS 13 May 2016, NL:RVS:2016:1624, 1383 and 1384.



apply the less strict *Köbler* 'test' in order to avoid that a non-referral gives rise to state liability 'in the exceptional case where the court has manifestly infringed the applicable law'.<sup>135</sup> The highest administrative courts tend to examine whether the case can be solved on other grounds, preferably national grounds, before delving into the intricacies of EU law and examining whether the *Cilfit* exceptions are fulfilled or not.<sup>136</sup> By contrast, the Supreme Court studies all EU law aspects before asking the question whether a reference is indeed necessary.<sup>137</sup> One interviewee added that even when a case can be solved on other grounds, the Supreme Court still examines whether that is also desirable.<sup>138</sup> The divergence between the Supreme Court and highest administrative courts in the adherence to *Cilfit* can also be attributed to the judicial law-making function of the Supreme Court as a third instance court. The highest administrative courts are also courts of fact and often rule as second instance courts.<sup>139</sup>

The reasonable reading of *Cilfit* also leaves more room for pragmatic and practical considerations.<sup>140</sup> This includes, for example, case-specific reasons that relate to the importance of the questions concerned or efficiency reasons concerning the consequences of referring in terms of the delay. The importance of the issue at stake plays an important role for highest administrative court judges. The decision (not) to refer was presented by highest administrative court judges as a balancing of competing considerations: the importance of the question versus the consequences of the delay in terms of cases to be put on hold.<sup>141</sup> Issues of minor importance are more easily decided upon by highest administrative courts without a referral. The same could also happen when too many cases are affected by a referral. In such a case, highest administrative court judges do not find it desirable that many cases are put on hold for an uncertain period.<sup>142</sup> This is especially a consideration in the field of migration where there are often many, possibly hundreds of cases, in which the same question is relevant.<sup>143</sup> Interviewed highest administrative court judges acknowledged that justice would come to a standstill if every question of EU law about which there is doubt were immediately referred to the CJEU.<sup>144</sup> The current President of the Aliens Chamber of the Council of State likewise held that a responsible judge takes into consideration the consequences of such a delay.<sup>145</sup>

*The delay explains why the Council of State did not refer questions about the intensity of review of the credibility assessment of the asylum claim in relation to Article 46(3) of the Asylum Procedures Directive, even though it held that the matter was far from clair.<sup>146</sup> It decided the case itself, because a referral would mean that the Council of State 'could almost shut down' because a very large number of cases had to be put on hold. Nonetheless, when the stakes are high, this could also be (an additional) reason to refer for courts.*

Interestingly, the civil chamber takes pragmatic and practical considerations into account in summary proceedings in which it is not obliged to refer.<sup>147</sup> The urgent character of summary proceedings does in principle not allow for a preliminary reference, even though most proceedings are no longer urgent once they reach the Supreme Court.<sup>148</sup>

<sup>135</sup>Interviews 10, 18; Case C-224/01, *Köbler*, ECLI:EU:C:2003:513, para. 53. Note that some A-Gs of the civil chamber also rely on this test in some opinions. E.g. ECLI:NL:PHR:2015:729 (*Stichting Brein*), para. 2.1.34.

<sup>136</sup>Sevenster and Wissels, above, n. 10, 90.

<sup>137</sup>Interview 34.

<sup>138</sup>Interview 30.

<sup>139</sup>Interview 48.

<sup>140</sup>Jaremba, above, n. 2; Krommendijk, above, n. 13, 133–136.

<sup>141</sup>Interviews 44, 72, 89.

<sup>142</sup>Interviews 14, 18, 39, 83. Sevenster and Wissels, above, n. 10, 90.

<sup>143</sup>Interview 14. See also ABRvS 14 July 2011, NL:RVS:2011:BR3771, para. 2.8.4. Sevenster and Wissels, above, n. 10, 92.

<sup>144</sup>Interviews 10, 18.

<sup>145</sup>N. Verheij, 'Voorwoord' [Foreword], in Bosma et al., above, n. 10, 83.

<sup>146</sup>ABRvS 13 April 2016, NL:RVS:2016:890–891, para. 5.2.

<sup>147</sup>Joined cases 35/82 and 36/82, *Morson*, ECLI:EU:C:1982:368, paras. 8 and 9.

<sup>148</sup>Interviews 27, 48, 59, 87.

Interviewees, nonetheless, considered that there should be 'something special' with the case.<sup>149</sup> The civil chamber feels more compelled to refer when the case deals with a question in which there is hardly any CJEU jurisprudence or when few cases reach the Supreme Court in the main procedure.<sup>150</sup> One example where the latter happens frequently is procurement law. The referral in *Connexxion* was based on the idea that 'we have to grab the chance', otherwise such cases would hardly come before the CJEU.<sup>151</sup> By contrast, when the importance of the question is of limited practical relevance, the civil chamber is less eager to refer and 'dares' to decide itself.<sup>152</sup> The civil chamber also pays more attention to the wish of the parties in summary proceedings. An additional reason for the referral of *Synthon* was that both parties urged the Supreme Court to refer.<sup>153</sup>

Overall, when courts (feel that they) have discretion (such as the highest administrative courts and the civil chamber in summary proceedings), they use pragmatic and practical considerations to make a decision which cases to refer or not. Such considerations act as some sort of filtering mechanism preventing those courts from referring on a weekly basis.

### 5.3 | The CJEU as a useful ally

Another explanation for the continued willingness of national courts to engage with the CJEU is that the CJEU can provide support to the national court. Especially in cases with considerable financial or political consequences, a referral can be helpful for the national court (Section 5.3.1). The authority of the CJEU can also be valuable for national courts internally vis-à-vis the legislature, executive or other branches of the judiciary (Section 5.3.2). The CJEU's authority can have the same function in a transnational context (Section 5.3.3).

#### 5.3.1 | Assistance from the CJEU in 'big' cases out of precaution

Judges held that they are more cautious when the political and financial stakes are higher. Such consequences can offer an additional 'push' to refer.<sup>154</sup>

*The Trade and Industry Appeals Tribunal referred a case about the imposition of fine for market manipulation despite the idea among judges that the issue was clair, which was subsequently illustrated by the short CJEU judgment and the absence of an A-G Opinion. The Tribunal considered it a delicate matter from the perspective of legal certainty and was, therefore, extra cautious.*<sup>155</sup>

*During interviews, judges and A-Gs were asked about Massar. This case dealt with the question whether the term 'inquiry' in the Directive on legal expenses insurance includes a procedure before the Employee Insurance Agency, in which the employer requests authorisation to dismiss an employee. The reason for questioning interviewees about this case is that the case at first sight seems rather simple from a legal point of view in the light of the jurisprudence of the CJEU. This is also because the CJEU handled the case in a three-judge formation without A-G opinion. The Supreme Court judgment explicitly referred to the considerable financial consequences of a positive answer to the question, also suggesting that other considerations played a role than purely legal ones.*<sup>156</sup> *One interviewee 'admitted' that the Supreme Court already knew the answer, namely that the costs are covered, and asked the CJEU to 'tick the*

<sup>149</sup>Interviews 45, 59.

<sup>150</sup>Interviews 41, 59, 75, 87.

<sup>151</sup>HR 27 March 2015, ECLI:NL:HR:2015:757 (*Connexxion*, C-171/15); Interviews 27, 48, 59, 87.

<sup>152</sup>Interviews 27, 75. HR 18 May 2018, ECLI:NL:HR:2018:721 (*Becton/Braun*), para. 3.3.7.

<sup>153</sup>HR 18 November 2016, ECLI:NL:HR:2016:2643 (*Synthon*, C-644/16); Interviews 27, 75, 87.

<sup>154</sup>Interview 87.

<sup>155</sup>CBb 6 November 2011, ECLI:NL:CBB:2009:BK2641; Case C-445/09, *IMC Securities BV*, ECLI:EU:C:2011:459.

<sup>156</sup>HR 3 October 2014, ECLI:NL:HR:2014:2901 (*Massar*), para. 3.7.4.

box'. Other interviewees held that it was better to have the CJEU decide on the matter and 'take the consequences for its account', because the idea was that the insurance policy costs would rise because of a positive answer. One interviewee referred to 'an alibi'. One interviewee argued that given the financial consequences, the Supreme Court does not easily 'tap away' a decision with the risk of making the wrong choice that has implications for thousands of cases. Preliminary questions were thus wise in order to 'to make a potential time bomb harmless in advance'. There were, however, other interviewees that disagreed with this reading of Massar and simply held that there were doubts about the interpretation of EU law and noted that it was a disputed matter in relation to which one could reasonably differ.

*Antroposana* dealt with the question whether anthroposophical medicinal products could be marketed without authorisation (CJEU: no). According to the A-G in the Dutch Supreme Court, the answer to the question was clear.<sup>157</sup> An interviewee likewise argued that the Supreme Court primarily referred in the light of the consequences for pharmaceutical companies.

In *ACI Adam*, the CJEU was essentially asked whether the Dutch Law on Copyright was consistent with EU law (CJEU: no). This law did not distinguish between lawful and unlawful sources from which consumers download for private use. Again, the considerable implications in this case reinforced the Supreme Court's inclination to refer.<sup>158</sup>

### 5.3.2 | Sword and leapfrog references: reliance on the CJEU's authority internally

The literature, especially earlier social science inspired studies, has primarily emphasised the internal function and relied on politico-strategic reasons for referral. Two approaches stand out. First, the bureaucratic politics model, suggesting that courts refer to solve struggles with other, often higher, courts and, hence, 'leapfrog' the national judicial hierarchy in order to seek support for their interpretation from the CJEU.<sup>159</sup> Second, the judicial empowerment thesis postulating that courts use the referral procedure as a 'sword' to force the legislature to amend legislation when they consider the law to breach EU law.<sup>160</sup> This research did not find much support for either thesis. These considerations only played a role in a number of highest administrative courts' cases.<sup>161</sup>

The 'leapfrog' thesis primarily explains referral of lower courts challenging a highest court. Nonetheless, one case was found in which the Central Appeals Tribunal challenged its administrative counterpart, the Council of State, albeit in a rather indirect way.

*In Chavez Vilchez, the Central Appeals Tribunal questioned the minimalist interpretation of Zambrano included in the Aliens Circular containing the policy rules as applied by the Immigration and Naturalisation Service.*<sup>162</sup> *The Circular only gave mothers a right of residence, derived from the right of residence of their children, when the father is not in a position to care for the child.*<sup>163</sup>

<sup>157</sup>HR 27 January 2006, ECLI:NL:HR:2006:AU5271 (*Antroposana*, C-84/06); ECLI:NL:PHR:2006:AU5271, para. 5.

<sup>158</sup>HR 21 September 2012, ECLI:NL:HR:2012:BW5879 (*ACI Adam*, C-435/12).

<sup>159</sup>K.J. Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration', in A-M. Slaughter, A.S. Sweet and J.H.H. Weiler (eds.), *The European Courts and National Courts* (Hart, 1998) 225, 241–247.

<sup>160</sup>An opposite thesis is that national courts 'shield' national legislation from the CJEU by withholding references. No support for this thesis was found in relation to the Dutch highest courts. Weiler, above, n. 112, 523; J. Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice' (1996) 19 *West European Politics*, 360, 377–379; Davies, above, n. 88, 210.

<sup>161</sup>Interviews 10, 18, 44, 66.

<sup>162</sup>The CRvB challenged this policy rule, but did not mention the case law of the ABRvS upon which this restrictive reading was based. CRvB 16 March 2015, NL:CRVB:2015:665, para. 4.2; Case C-133/15, *Chavez-Vilchez*, ECLI:EU:C:2017:354; Case C-34/09, *Zambrano*, ECLI:EU:C:2011:124.

<sup>163</sup>ABRvS 9 August 2013, NL:RVS:2013:2837.

Some highest administrative court judges, albeit certainly not all, underscored the relevance of the 'sword' thesis and acknowledged that the CJEU is sometimes used by national courts to say what they already know with respect to an issue that is actually *clair*.<sup>164</sup>

One example is *Wagenborg* about ferry services to the Dutch Wadden Sea islands. During the proceedings, the Minister of Infrastructure took a firm position and according to some interviewees, 'put up a smokescreen with a lot of fanfare' in order to legitimise the awarded concession. The Trade and Industry Appeals Tribunal was quite confident about the interpretation of EU law, but some judges considered a 'helping hand' from the CJEU useful given the position of the Minister.<sup>165</sup>

Similar considerations played a role in two references of the Council of State in the area of migration, *Chakroun* and *K.* that are discussed more extensively in another publication.<sup>166</sup>

Another strategic non-migration case of the Council of State is *Betfair*, dealing with a British company that could not offer its services for betting on sporting events and horse races via internet and telephone because of the closed licensing system of games of chance.<sup>167</sup> Just like the other cases, the Council of State had doubts about the compatibility of this system with EU law, also because the Commission had started an infringement procedure against the Netherlands. During the hearing, *Betfair* read from Commission documents. One consideration of the Council of State was that it would be put in a difficult position had it not referred and the Netherlands was subsequently found to breach EU law in the infringement procedure before the CJEU.

A reference to the CJEU can not only constitute an argument of authority towards the legislature, but also vis-à-vis the executive.

This idea figured in *Fischer-Lintjens*.<sup>168</sup> The Central Appeals Tribunal felt forced to refer, because the Dutch organisation that implements national insurance schemes (Svb) was not willing to arrive at a reasonable solution. Rather, it 'rigidly' adhered to the retroactive withdrawal of the certificate of non-insurance as a result of which the health care insurance of *Fischer-Lintjens* was cancelled. In its order for reference, the Tribunal hinted at the undesirability of this approach from the perspective of the principle of legal certainty. One interviewed judge admitted that the Tribunal 'used' the CJEU to say what it wanted to say itself, but with more authority.

One could be critical about a strategic reading of several of these referrals. The decisions to refer in these cases can equally be explained from a purely legal perspective, as some judges did. Judges argued that when there is much substantive 'counteraction' from the executive or the legislature, this simply shows that there can be doubt about the interpretation of EU law and there is no *acte clair*.<sup>169</sup>

As mentioned earlier, these politic-strategic reasons do not fully capture the referral practice of the Supreme Court. Interviewees from the Supreme Court were adamant that the aforementioned politico-strategic reasons do not (partly) explain some decisions (not) to refer. They, and some highest administrative court judges,<sup>170</sup> emphasised

<sup>164</sup>Interviews 10, 12, 18.

<sup>165</sup>CBB 15 April 2013, ECLI:NL:CBB:2013:BZ6922, para. 5.2.

<sup>166</sup>*Chakroun* dealt with a Dutch rule, eventually found to breach EU law, that stipulated that family reunification could be refused to a sponsor who does not have a lasting income which is equal to at least 120% of the minimum wage. Case C-578/08, *Chakroun*, ECLI:EU:C:2010:117. The rule in *K. and A.* required the family members of a third country national to pass a civic integration exam to enter the Netherlands. Case C-153/14, *K. and A.*, ECLI:EU:C:2015:453. Krommendijk, above, n. 13, 122–123.

<sup>167</sup>Case C-203/08, *Betfair*, ECLI:EU:C:2010:307.

<sup>168</sup>Case C-543/13, *Fischer-Lintjens*, ECLI:EU:C:2015:359.

<sup>169</sup>Interviews 49, 51.

<sup>170</sup>Interviews 5, 32, 72, 89.

that the Supreme Court does not have 'a strategy', 'hidden agendas' or 'own interests' since it is a neutral organ that is 'too serious' for that.<sup>171</sup> Interviewees also held that the Supreme Court does not need the support of the CJEU vis-à-vis the legislator to strike down national legislation, because it is 'man enough' to do so on its own given the constitutional setup and the independence of the judiciary.<sup>172</sup> The idea is also that the Supreme Court persuades based on its judgments.<sup>173</sup> Two explanations for the absence of politico-strategic consideration among Supreme Court judges were mentioned during interviews.<sup>174</sup> Firstly, some interviewees argued that the highest administrative court judges generally 'think' more in political terms and are more focused on the legislature and executive.<sup>175</sup> Secondly, it seems safe to say that politico-strategic reasons play a more important role in sensitive administrative law fields, such as migration. Emotions and moral or ethical considerations often play a bigger role in these fields than in an area such as tax law. Interviewees noted that tax cases are rather technical and 'only' deal with money. Such cases hardly ever relate to the essence of the rule of law and emotions or conscience issues hardly play a role.<sup>176</sup> One former asylum judge who made a move to tax law observed that the confrontational relationship between different levels in the judicial hierarchy and between the judiciary and the legislature is typical for asylum law.<sup>177</sup>

### 5.3.3 | Reliance on the CJEU's authority transnationally

The CJEU's authority is not only sought in internal 'conflicts' with the legislature, executive or other courts. It is also used at times to solve a transnational conflict with other courts or to prevent those conflicts from arising, also with a view to ensuring the uniformity of EU law. This motive is most visible in the references of the tax chamber in customs cases. The question in these cases is frequently under which tariff heading of the Combined Nomenclature a particular good is to be classified. Such a reference does not mean that the Supreme Court does not 'dare' to decide the case itself, as one judge put it.<sup>178</sup> The problem is that when the Supreme Court answers the question itself and classifies the product, it could do so in a different way than courts in other EU Member States. When it chooses a more disadvantageous classification for the undertaking(s) concerned, this could have the consequence of disrupting trade flows and distorting competition.<sup>179</sup> The Supreme Court is thus more careful in customs cases and prefers referring to Luxembourg so that 'the whole of Europe knows where we stand', thereby guaranteeing the uniform application of EU law.<sup>180</sup> Interviewees realised that the law-making character is limited in most of these cases and that they do not pertain to fundamental aspects of the EU legal order.<sup>181</sup> This explains, in their view, why most of these references are handled by the CJEU without A-G Opinion, as was concluded earlier.<sup>182</sup>

The Central Appeals Tribunal also used the preliminary ruling procedure to solve a difference in opinion with a German court in *Mertens*.<sup>183</sup>

<sup>171</sup>Interviews 33, 41, 59, 75, 82.

<sup>172</sup>Interviews 15, 30, 41, 59, 75; Feteris, above, n. 37, 166.

<sup>173</sup>Interviews 87.

<sup>174</sup>One could argue that the difference between politico-strategic 'sword' referrals of the highest administrative courts and the civil chamber's references out of precaution (discussed in section 5.3.1) is small. One could argue that these cases are comparable. Nonetheless, the interviewed judges talked about these cases differently. Highest administrative court judges opted for a strategic reading; Supreme Court judges primarily relied on legal-substantive arguments.

<sup>175</sup>Interviews 41, 43, 59, 66.

<sup>176</sup>Interviews 15, 78, 82.

<sup>177</sup>Interview 51.

<sup>178</sup>Interview 30.

<sup>179</sup>Interviews 15, 33, 78, 82.

<sup>180</sup>Interview 78.

<sup>181</sup>Interviews 15, 30, 33.

<sup>182</sup>Interviews 15, 30, 33.

<sup>183</sup>Case C-655/13, *Mertens*, ECLI:EU:C:2015:62.

**TABLE 3** Summary of key findings (the more +, the more that motive/finding applies to the particular court)

	Highest administrative courts	Civil chamber	Tax chamber
Implementation of CJEU judgments (Section 3)	Full and automatic		
Satisfaction with CJEU judgments (Section 4)	+ (CBb more positive)	++	+++
Understanding for the difficult context of CJEU	+ (differences among judges)	+++	+++
<b>Motives to refer (Section 5):</b>			
Legalist considerations	+	+++	+++
Strict application of <i>Cilfit</i>	+	++	+++
Pragmatic and practical considerations	+++	++ (in summary proceedings)	+
Assistance from CJEU in 'big' cases	+	++	+
Bureaucratic politics (leapfrog)	+		
Judicial empowerment (sword)	++		
Assistance from CJEU transnationally	+	+	++ (in custom tariff cases)

*This case dealt with Mertens' right to unemployment benefits who had worked in Germany while living just across the border in the Netherlands. The Tribunal had tried to contact the German court, where Mertens had filed his appeal against the German refusal to grant unemployment benefits, with the idea of coming to a coordinated solution. The German judge, however, declined to do so and was unwilling to discuss individual pending cases because of privacy considerations.<sup>184</sup> According to some interviewees, the case was rather simple from a legal perspective. The Tribunal also stated in a rather straightforward way in its order for reference that it was obvious that Germany is obliged to grant the benefits.<sup>185</sup> The CJEU decided accordingly in a three-judge formation without an A-G opinion. It only needed 15 paragraphs in which it referred extensively to its previous case law, thereby suggesting that the matter was clear. The Central Appeals Tribunal thus received the desired CJEU authority.*

## 6 | CONCLUSION

This article showed that the Dutch highest courts have implemented the requested CJEU judgments almost fully and automatically. This finding is remarkable because there has been more criticism than ever in recent years with respect to the preliminary ruling procedure, the CJEU and its case law. The conclusion is also surprising considering that Dutch courts were not enthusiastic about all CJEU judgments. Interviewed judges of the highest courts pointed to incoherencies in the case law, factual mistakes or unclear and unanswered questions. This discontent has, however, not prevented the Dutch courts from referring future cases.

This article thus suggests that there is no (feedback) relationship between the quality of CJEU judgments and the motives of courts to refer. Several explanations were found for this. The Supreme Court continues to refer cases to the CJEU because it exhibits a natural loyalty towards its obligation to refer under Article 267 TFEU and tries to

<sup>184</sup>CRvB 9 December 2013, ECLI:NL:CRVB:2013:2665, para. 3.10.

<sup>185</sup>*Ibid.*, paras. 3.8–3.9.

adhere strictly to *Cilfit*. While Supreme Court judges primarily include legal-formalist considerations in their decision (not) to refer, highest administrative court judges also take practical and pragmatic considerations into account, such as case-specific reasons relating to the importance of the question at stake as well as the delay caused by a referral (see Table 3). This approach was attributed to a natural reluctance to refer which is, however, not connected to the quality of CJEU judgments. The highest administrative courts' continued engagement with the CJEU was also attributed to the usefulness of the CJEU as an ally. The CJEU has provided support to national courts when decisions with considerable financial or political consequences needed to be made. In addition, the help of the CJEU has also been sought at times vis-à-vis the legislature, executive or other branches of the judiciary, as well as other national courts or administrations in a transnational context. The highest Dutch courts thus remain, for various reasons, loyal interlocutors of the CJEU that remain willing to continue sending questions and to implement CJEU judgments fully and automatically, despite some dissatisfaction.

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